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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Geographic Partitioning and Spectrum)
Disaggregation by Commercial Mobile)
Radio Services Licensees)
)
Implementation of Section 257 of the)
Communications Act --)
Elimination of Market Entry Barriers)

WT Docket No. 96-148

COMMENTS OF SPRINT SPECTRUM L.P.

For Sprint Spectrum L.P.
Jonathan M. Chambers
1801 K Street, N.W.
Suite M-112
Washington, D.C. 20006
(202) 835-3617

Cheryl A. Tritt
Joan E. Neal
James A. Casey
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

Attorneys for Sprint Spectrum L.P.

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TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION AND SUMMARY	1
II. DISCUSSION	2
A. Parties Should Have Significant Flexibility In Determining How Licenses Are Partitioned and Disaggregated	3
1. The FCC Should Not Require Geographic Partitioning To Follow County Boundaries Or Limit The Total Area That May Be Partitioned.....	4
2. The Commission Should Not Limit The Amount Of Spectrum That A Licensee May Disaggregate	5
3. Entrepreneur Block Licensees Should Be Permitted To Partition And/Or Disaggregate Portions Of License Areas Or Spectrum To Non-Entrepreneurs In The Near Term	7
B. New Licensees Should Be Given A More Flexible License Term.....	9
C. Licensees Should Be Permitted Different Options For Fulfilling Construction Requirements	10
D. Related Matters	12
III. CONCLUSION.....	13

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COMMENTS OF SPRINT SPECTRUM L.P.

Pursuant to the Notice of Proposed Rule Making ("NPRM") released by the Federal Communications Commission ("FCC" or "Commission") on July 15, 1996 in the above-captioned proceeding,¹ Sprint Spectrum L.P. ("Sprint Spectrum") submits these Comments.

I. INTRODUCTION AND SUMMARY

Sprint Spectrum applauds and strongly supports the FCC's proposals to modify the broadband personal communications service ("PCS") rules to permit geographic partitioning by all PCS licensees and to permit spectrum disaggregation prior to the year 2000. As the Commission stated, these proposed changes will allow licensees to more

¹ See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers*, Notice of Proposed Rule Making, WT Docket No. 96-148; GN Docket No. 96-113, FCC 96-287 (July 15, 1996).

flexibly tailor their business strategies, permit new players (particularly those with limited access to capital) to enter the PCS market, and expand the provision of PCS services to areas that might not otherwise receive them. In addition, the proposed changes are consistent with the Commission's overall goals of reducing regulatory burdens on telecommunications carriers, providing for more flexible regulation of commercial mobile radio services, and allowing market forces, rather than regulatory restrictions, to more effectively determine the development and most efficient use of limited radio spectrum.

Moreover, the Commission can also meet these goals by providing somewhat greater flexibility to licensees in some instances. Specifically, the Commission should provide: (1) increased flexibility in determining the area to be partitioned or the amount of spectrum to be disaggregated; (2) a limited exception to the general ban on disaggregation and/or partitioning of entrepreneur licenses to non-entrepreneurs during the first five years of the license term; and (3) more flexible license terms and build-out requirements. These additional changes would benefit everyone concerned -- consumers, licensees, and prospective new entrants -- and would serve the public interest.

II. DISCUSSION

Sprint Spectrum agrees with the Commission's overall goal of enhancing the flexibility of PCS licenses. Certain aspects of the Commission's proposals, however, establish artificial restrictions on a licensee's ability to creatively and efficiently utilize the spectrum that it won the right to use, often at great cost, at auction. These restrictions

are unnecessary and inconsistent with the Commission's broader policies regarding flexible regulation of commercial mobile radio services ("CMRS").²

A. Parties Should Have Significant Flexibility In Determining How Licenses Are Partitioned And Disaggregated

The Commission discusses a number of issues addressing how PCS licensees may partition or disaggregate their licenses. The Commission proposes to require partitioning along county lines and requests comment on whether it should limit the total area which a non-entrepreneur licensee may partition.³ With respect to disaggregation, the Commission tentatively concludes that it will not permit disaggregation for broadband PCS in blocks smaller than a 1 MHz block of paired frequencies, "thus requiring the disaggregating licensee to retain a minimum of 1 MHz."⁴ Finally, the Commission proposes to allow partitioning and disaggregation of entrepreneur block licenses only to other qualifying entrepreneurs during the first five years of the license.⁵

² See, e.g., *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Notice of Proposed Rule Making, 11 FCC Rcd 2445 (1996) ("The flexible regulatory scheme proposed in this Notice will help eliminate the need for the Commission to initiate a rule making or grant multiple waivers each time a broadband CMRS provider or new entrant to a market wishes to adjust its operational mode to respond to consumers' changing communications requirements.").

³ NPRM at ¶¶ 18-19.

⁴ *Id.* at ¶ 42.

⁵ *Id.* at ¶¶ 21, 24, 46.

1. The FCC Should Not Require Geographic Partitioning To Follow County Boundaries Or Limit The Total Area That May Be Partitioned

The Commission's proposal to require partitioning along county lines will needlessly complicate matters for partitioning parties. As the Commission recognizes, service areas will not always fall naturally along county lines. In many geographically large counties, for example, populations are clustered in a relatively small portion of the county. In these instances, it may not be economically desirable to partition the entire county. While the Commission proposes to allow waiver requests in these circumstances,⁶ such a process merely introduces further delay and uncertainty into the partitioning process. Sprint Spectrum submits that a better approach would be to permit any geographic lines to be drawn so long as the parties file with their applications a detailed map of the proposed partition. This approach provides greater flexibility for licensees and will allow the market, rather than regulation, to drive build-out of PCS licenses.

In keeping with this more flexible approach, the Commission should not limit the total area that a non-entrepreneur licensee may partition.⁷ No prudent PCS licensee is likely to partition such a significant portion of its license area that it no longer offers a viable service. Moreover, under existing transfer of control rules, a non-entrepreneur block licensee may transfer all of its license area, subject to FCC approval. Because

⁶ *Id.* at ¶ 18.

⁷ Sprint Spectrum recognizes that such limitations may be necessary for entrepreneur block licenses. Issues involving such licenses are discussed *infra* at 7.

partition applications presumably would receive the same FCC scrutiny accorded full transfers of control, it makes little sense to arbitrarily limit the total area that a licensee may partition. Non-entrepreneur PCS licenses should be freely transferable, in part or in their entirety, to those entities who value them most highly and will put them to the most efficient and effective use.

2. *The Commission Should Not Limit The Total Amount of Spectrum That A Licensee May Disaggregate*

The Commission likewise should not artificially restrict either the upper or lower limits of spectrum that a licensee may disaggregate. The Commission's proposal to limit disaggregation to 1 MHz pairings would hinder development of more efficient uses of PCS spectrum. A licensee should have the option of disaggregating smaller than 1 MHz pairings if the bandwidth needs of the disaggregating party are less than that amount. Again, the market and available technology, rather than regulation, should set any limits.⁸ At the very least, the Commission should establish a waiver procedure to permit less than 1 MHz disaggregation where justified.

The Commission also asks whether the definition of broadband PCS requires that all broadband licensees be assigned more than 1 MHz of spectrum, and whether it should

⁸ Efficient spectrum management requires, however, that disaggregation be allowed only for contiguous spectrum beginning at either end of the original PCS licensee's spectrum block. Otherwise, individual spectrum blocks could be divided up randomly, with a resulting loss in the amount of useable spectrum due to the necessity to establish "guard bands" around each segregated spectrum block.

modify or clarify its definition of broadband PCS.⁹ The definition of broadband PCS need not be read to place any limitations or requirements on spectrum disaggregation. The Commission's primary purpose in creating a distinction between narrowband and broadband PCS was to ensure the availability of spectrum blocks that are sufficiently large to permit an entire range of possible PCS services.¹⁰ Although the distinction may be applicable when allocating and auctioning spectrum, strict adherence to a broadband PCS definition becomes less important once licensees are using the spectrum to provide services, because technology will effectively determine what services can be offered within available spectrum allocations.¹¹ The Commission's regulations should be sufficiently flexible to encourage the development and implementation of the most efficient spectrum utilization methods.¹²

⁹ The Commission defines "broadband PCS" as:

Radio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks.

See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, 7713 (1993) ("Second R&O").

¹⁰ *See Second R&O* at 7712.

¹¹ Existing Commission rules governing narrowband and broadband services should not be affected by this flexible approach to spectrum disaggregation.

¹² In setting a broad definition of broadband PCS, the Commission noted that "the more restrictive approaches favored by some parties would tend to have a chilling effect on innovation and creativity that would diminish rather than encourage the introduction of new PCS applications." *Id.*

3. ***Entrepreneur Block Licensees Should Be Permitted To Partition And/Or Disaggregate Portions Of License Areas Or Spectrum To Non-Entrepreneurs In The Near Term***

Sprint Spectrum acknowledges that the Commission cannot allow revised partitioning and disaggregation rules to permit non-entrepreneurs to compromise the entrepreneur block eligibility rules. Although some limitation on disaggregation and partitioning may be proper, a complete ban on even limited partial transfers to non-entrepreneurs in the first five years of the license is unnecessary to meet the Commission's goals.¹³

License partitioning and spectrum disaggregation provide the Commission with an opportunity to further assist small businesses participating in PCS. Many existing small business PCS licensees face serious financial challenges as they attempt to secure sufficient capital for product development and system build-out. Their success is by no means assured by virtue of having acquired the licenses.¹⁴ Partitioning and disaggregation agreements with larger, more financially secure entities represent an added resource for much needed capital.

Therefore, entrepreneur block licensees should be permitted to partition up to 20% of their total geographic license area (or 20% of their total MHz - Pops) to non-entrepreneurs prior to the end of the first five years of the license. In addition, they

¹³ Sprint Spectrum supports the Commission's proposal to prohibit **complete** license transfers to non-entrepreneurs during the first five years of the license. NPRM at ¶ 24.

¹⁴ See, e.g., *High PCS License Prices Have Led To Many Questions*, Washington Telecom News, No. 21, Vol. 4 (May 27, 1996)("[T]here probably will be many C-block winners that fail. . . . Companies already are having difficulties, and the actual buildout has not even begun.").

should be permitted to disaggregate up to 15% of their total spectrum to a non-entrepreneur during this period. Because the original entrepreneur block licensees would be required to either retain a significant portion of their original license (or transfer it to another eligible entrepreneur), the Commission would continue to promote small company participation in the provision of new innovative mobile services. At the same time, these companies would have increased access to financial resources that are essential to the capital intensive, highly competitive PCS industry.

The Commission's unjust enrichment provisions should, of course, apply to transactions of this nature and unjust enrichment should be calculated proportionally, based upon the number of MHz-Pops partitioned or disaggregated. Any unjust enrichment payment should be due at the time of the transfer by either the original licensee or the partitioning/disaggregating party.¹⁵ Given that the price paid for the original license likely will be reflected in the price paid for the partitioned/disaggregated spectrum, it will make little practical difference to the contracting parties where the obligation to the United States Government rests after the transfer. The most logical and administratively simple solution would leave the financial obligation to the Federal Government for the entire original license with the original licensee. Any further details regarding payment should be left to the negotiating parties.¹⁶

¹⁵ The parties should be permitted to assign this burden in their transfer agreement.

¹⁶ The payment obligation for the original license should remain with the licensee for non-entrepreneur blocks as well.

B. New Licensees Should Be Given A More Flexible License Term

The Commission proposes that new licensees holding PCS licenses by virtue of partitioning or disaggregation be authorized to hold their licenses only for the remainder of the original licensee's ten-year term (with a limited exception for those parties obtaining disaggregated spectrum that are existing PCS licensees in the same geographic area).¹⁷ The Commission also proposes that these parties be afforded the same renewal expectancy as the original licensees.¹⁸

Sprint Spectrum agrees that the new licensees should be granted the same renewal expectancy as the original licensees. With respect to license term, the Commission should permit the term for partitioned or disaggregated licenses to run anew from the date of the transfer of the license. The original license would retain its initial license term. Because this flexible approach to licensing terms for partitioned or disaggregated licenses would provide the transferee with a longer license period and, therefore, a more valuable property, it will encourage the partitioning and disaggregation processes and speed further the introduction of new competitors and new services to the market. Granting newly partitioned or disaggregated licenses a fresh ten-year term would also resolve the Commission's concern regarding how to apply the renewal standard in cases where a party acquires a disaggregated license near the end of the original ten-year term.¹⁹

¹⁷ NPRM at ¶¶ 29, 57.

¹⁸ NPRM at ¶¶ 29-30, 57.

¹⁹ *Id.* at ¶ 57. Moreover, because the Commission will review the qualifications of the new licensee prior to approval of a transfer, this proposal raises no licensee eligibility or fitness concerns.

There is no legal impediment to a new license term. As the Commission notes in the NPRM, there is precedent in the cellular context for granting a “fresh” license term to newly partitioned licenses.²⁰ The Commission’s concern that the original licensee would confer greater rights than it has is unfounded because the licensee would not be conferring these rights -- the Commission would. The original licensee and the new entrant could negotiate a geographic partition or spectrum disaggregation for a set price conditioned upon FCC grant of the transfer (as is routinely done in all types of transactions involving a transfer) and upon FCC extension or “restarting” of the license term for the new licensee. The granting of any rights is, therefore, ultimately left to the Commission.

Regardless of whether the Commission adopts rules allowing a new license term for disaggregated or partitioned licenses, it should adopt its proposal to permit disaggregating licensees with existing PCS licenses in the same geographic area to hold the newly disaggregated spectrum for the term of that licensee’s original PCS license.

C. Licensees Should Be Permitted Different Options For Fulfilling Construction Requirements

The Commission proposes two alternative approaches for satisfying construction requirements for new licenses created by disaggregation and/or partitioning: (1) the new licensee must satisfy the same construction requirements as the original licensee; or (2) if the original licensee certifies that it has met its five-year build-out requirements and will

²⁰ *Id.* at ¶ 29, n.55.

meet the ten-year coverage requirements, the new licensee would be subject to a somewhat relaxed construction requirement.²¹

Sprint Spectrum agrees with the Commission's proposal to provide the flexibility of two options, both of which ensure that construction requirements are met, consumers are receiving service, and licensees are not warehousing spectrum. Sprint Spectrum urges the Commission, however, to permit slightly more flexibility by allowing the second (more relaxed) construction requirement option for the new licensees even if the original licensee has not yet met its five-year build-out requirements so long as the original licensee certifies (as the Commission proposes it certify for its ten-year requirements) that it will meet the five-year coverage requirements. This approach would still ensure that the Commission's construction requirements are met, while providing even more flexibility for licensees and increasing the speed with which new competitors enter the market and new services are provided to consumers.

In the event that either licensee fails to meet the applicable construction requirements, the FCC proposes that the defaulted license revert to the Commission without *any* further action by the Commission.²² Although Sprint Spectrum agrees that the construction requirements should be independent obligations of the two licensees, it urges the Commission to clarify or confirm that an enforcement procedure must be

²¹ *Id.* at ¶¶ 32-34, 51-53. Sprint assumes that this second relaxed construction option, as proposed, is open to the parties prior to five years into the license term so long as the five-year construction requirements have already been met.

²² *Id.* at ¶ 55.

invoked to permit the licensee to make a showing regarding its build-out progress before imposing such a draconian result.

D. Related Matters

In addition to the issues outlined above, the NPRM raises a number of miscellaneous questions related to the overall partitioning/disaggregation proposal. Specifically, it seeks comment on its tentative conclusions that: (1) combinations of partitioning and disaggregation will be allowed; (2) existing partial transfer procedures be used for partitioning and disaggregation; (3) existing technical rules should be maintained and applied to partitioned license areas; and (4) new entrant licensees who gain their license through disaggregation or partitioning should be treated as any other subsequent entrants for purposes of the microwave relocation cost-sharing plan.

Sprint Spectrum supports the Commission's tentative conclusion that it should allow combinations of partitioning and disaggregation. This approach furthers each of the Commission's goals in allowing partitioning and disaggregation and allows for the greatest flexibility in spectrum use and service build-out.

Existing partial transfer procedures also are adequate for processing partitioning and disaggregation requests. No further procedures are necessary and would needlessly complicate the process. In addition, existing technical rules should be maintained and applied to partitioned license areas.

The Commission also correctly concludes that new entrants under the partitioning and disaggregation procedures should be subject to the microwave relocation cost-sharing plan. To the extent that this plan will charge licensees solely based on the amounts paid to relocate a particular microwave link and the number of PCS licensees that would have

interfered with the link, the approach is acceptable. It is important, however, that these new entrants only pay for those relocations where they actually would cause interference. Therefore, payment should be required only for interference to links within their partitioned geographic region or within the portion of the disaggregated spectrum that they occupy.

III. CONCLUSION

For the reasons stated above, the Commission should adopt its proposals to provide additional flexibility to PCS licensees with the modifications and clarifications suggested by Sprint Spectrum.

Respectfully submitted,



Cheryl A. Tritt

Joan E. Neal

James A. Casey

MORRISON & FOERSTER LLP

2000 Pennsylvania Avenue, N.W.

Suite 5500

Washington, D.C. 20006

(202) 887-1500

For Sprint Spectrum L.P.

Jonathan M. Chambers

1801 K Street, N.W.

Suite M-112

Washington, D.C. 20006

(202) 835-3617

Dated: August 15, 1996

Attorneys for Sprint Spectrum L.P.

CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **COMMENTS OF SPRINT SPECTRUM L.P.** was mailed on this 15th day of August, via first class U.S. mail to the following:

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Roslind Allen, Associate Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., - Room 5002
Washington, D.C. 20554

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

David Furth, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 5202
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

David Nall
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 7002
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

Mika Savir
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 7002
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W. - Room 844
Washington, D.C. 20554

Dorothy Conway
Federal Communications Commission
1919 M Street, N.W., - Room 234
Washington, D.C. 20554

Michele Farquhar, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., - Room 5002
Washington, D.C. 20554

Timothy Fain
OMB Desk Officer, 10236 NEOB
725 17th Street, N.W.
Washington, D.C. 20503


Kimberly E. Thomas